

**HISTORIC ARBITRATION AWARD IN CFS CLASS ACTION GRIEVANCE  
MANAGEMENT'S RECKLESS VIOLATION PROVIDES \$1,000,000.00  
PLUS WINDFALL FOR 24 FORMER CFS CLERKS**

The holiday season will be a lot merrier for 24 former Oakland CFS clerks, thanks to an arbitrator's decision. The ruling has given them portions of an award totaling \$1,039,572.91 – arguably one of the largest payouts to individuals in APWU history. Some of the people received over \$50,000.00. The decision settles a crossing crafts grievance filed in 2002.

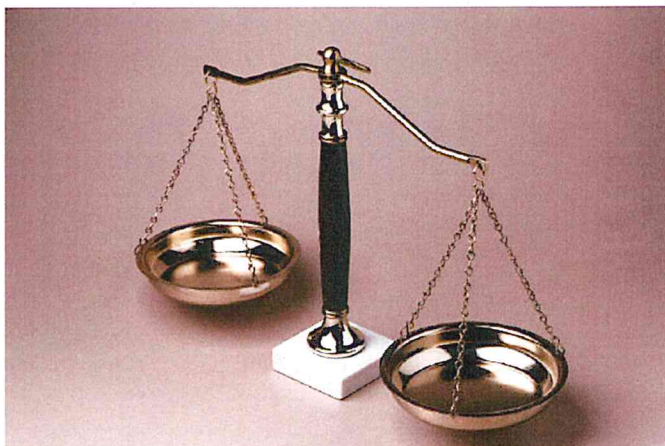
The case originated with the practice of having injured letter carriers work in the CFS unit. The Oakland Local argued that the carriers should have been assigned elsewhere. Their presence in the unit denied overtime to CFS clerks on the overtime desired list.

After the decision was issued, the USPS contended that only five or six clerks were affected. The Oakland Local argued successfully for the inclusion of twenty-four clerks, nearly 25% of the CFS clerks holding duty assignments in the unit at the time. The violation period extended from May 7, 2002, through July 29, 2006.

The Oakland Local contended that for every hour worked in the unit, EVERY affected CFS clerk on the ODL should be paid an equal amount. Arbitrator Butler ruled in the Local's favor in the original grievance. However, the Local had to file a noncompliance grievance in 2010 when management did not pay the people.

On June 27, 2013, Arbitrator Altemus ruled that the twenty-four individuals identified by the Local will be paid for the periods of time they were actually available for work during the relevant period, plus interest at the Federal Judgment rate.

The checks, which range from \$21,819.97 to \$55,893.31, have been issued, as well as the interest checks.



REGULAR ARBITRATION PANEL

_____	)	
In the Matter of the Arbitration	)	Grievant: Class Action
	)	
Between	)	Post Office: Oakland P&DC
	)	
UNITED STATES POSTAL SERVICE	)	USPS Case No.: F06C-1F-C 09437257
	)	
And	)	APWU Case No.: CL-086-10
	)	
AMERICAN POSTAL WORKERS	)	
UNION, AFL-CIO	)	
_____	)	

BEFORE: Daniel F. Altemus, Arbitrator

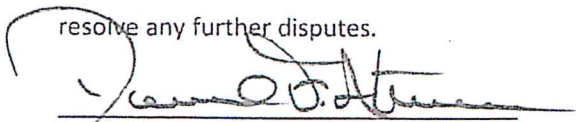
APPEARANCES:

For the U.S. Postal Service:	David Dupart
For the Union:	Shirley J. Taylor

Place of Hearing	Oakland, CA
Dates of Hearing:	March 15, 2013
Date of Briefs	April 22, 2013
Date of Award:	June 27, 2013
Relevant Contract Provisions:	Article 15
Contract Year	2006-2010
Type of Grievance:	Contract

SUMMARY OF AWARD

This matter concerns a dispute regarding the Service's non-compliance with an Award issued by another Arbitrator in Case No. F00C-4F-C 02170515 / CL-209-02C. The grievance is sustained as there has been no compliance with the prior Award. Compliance will be undertaken in accordance with the directions set forth in the opinion section of this Decision. The Arbitrator will retain jurisdiction to resolve any further disputes.

  
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Daniel F. Altemus

STATEMENT OF THE CASE

On May 21, 2002, the Union initiated a grievance concerning the assignment of letter carrier employees to work in a Central Forwarding System unit ("CFS") which it claimed should be performed by clerk employees. The matter was not resolved and it proceeded to arbitration in 2008. On June 5, 2009, Arbitrator Fred Butler issued a decision wherein he found that the Service had violated the parties' Agreement by virtue of its employment of "Limited Duty and Rehab" Letter Carrier employees into positions at the CFS over a period of several years rather than use clerk employees represented by the Union in this matter. His Award stated:

1. The matter is remanded to the parties to determine all overtime hours worked by the carriers retroactively to fourteen days prior to the filing of the grievance.
2. The CFS clerks on the OTDL to be equally paid at thee(sic) overtime rates for all hours worked by the Carriers in the CFS unit retroactively to fourteen days prior to the filing of the grievance.

The Arbitrator will retain jurisdiction over this matter for ninety days of this Decision/Award.

On July 27, 2009, a request for clarification was submitted to Arbitrator Butler by the Union. The request states, in part:

"This is to inquire if the remedy in the case is as stated in the JCIM -- Page 38 [Article 7, page 4] which states: "Generally, when the union establishes that an employee was assigned across craft line or occupational groups in violation of Article 7.2.B or 7.2.C, a "make whole" remedy requires the payment (at the appropriate rate) to the available and qualified employee(s) who would have been scheduled to work but for the contractual violation." To include all straight time and overtime hours worked by the Letter Carriers OR is it only the overtime hours worked by the Letter carriers during the tenure of the violation that is to be paid.

....

Could you please clarify for both Mr. Thomas and me just what is to be paid to the clerk craft employees who worked in the CFS unit.

On August 8, 2009, Arbitrator Butler responded with an e-mail to both parties that states, in its entirety:

I did receive Ms. Taylor's inquiry. I understand the confusion which may have been caused by paragraph one of the AWARD section and apologize it it (sic) confused the



matter. . However the intent in the decision was to Award the remedy requested by the APWU in this matter and paragraph two mirrors that request and states:

“2. The CFS clerks on the OTDL to be equally paid at thee(sic) overtime rates for all hours worked by the Carriers in the CFS unit retroactively to fourteen days prior to the filing of the grievance.”<sup>1</sup>

I hope this clears up the matter

Suffice it to say that it did not.

No further requests were made by either party to Arbitrator Butler concerning his Award and the 90 day period of his retained jurisdiction elapsed. The Service took no action to vacate the Award. What did occur was a continuing dispute between the parties regarding what records of the Carriers' work time in the CFS needed to be produced. The Service continued to assert that only overtime hours of the carriers need be produced despite the Union's strong protests to the contrary. Further correspondence between the parties reveals the additional contentions of the Service that, due to the passage of time, certain pay records might not be readily available.

On January 28, 2010, Frederic Jacobs, the local Union President sent a letter to the Service which identified 26 Clerk employees whom he contends were on the OTDL list at the CFS. The list is accompanied by Mr. Jacobs' assertion that each employee is “to be equally paid at the overtime rate for all hours worked by the Carriers in the CFS unit. . . .”

No resolution was reached and the instant grievance was initiated in early February, 2010. The basis of the grievance was the alleged non-compliance with Award of Arbitrator Butler. The Step 1 meeting was held on February 11 and the Appeal to Step 2 was filed on February 17. An initial Step 2 meeting was held between Mr. Jacobs and Labor Relations Manager, Eric Thomas, on March 17. Extensions were mutually agreed to in an effort to find a resolution, albeit without success. Thomas issued his Step 2 Decision on November 17 wherein he denied the grievance. In describing the Management position, Thomas writes, after noting the reasons for the delay in obtaining time records,:

During the time beginning June 2009 and November 2009 the union understood reasons for delay in producing the time records information. The union suddenly changes their position with respect to how to comply with the arbitrator's amended remedy award. Specifically, the union took the position that all hours, not just overtime hours, were

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<sup>1</sup> It should be noted that this language is exactly the same as the requested relief stated in the Union's original grievance.

needed to determine compensation. At all time management informed the union that the only information relevant to compliance with the remedy award was the number of carrier overtime hours.

Thomas' letter continues with reference to the JCIM section referenced in Ms Taylor's letter to Arbitrator Butler and various decisions of other arbitrators in Postal Service cases that address the issues involved with monetary remedies. He concludes with the following:

A review of the available time records for the relevant time period shows clerks on the OTDL working the CFS unit worked overtime. The union claim of 20 hours at the overtime rate, per week, during the relevant time period is improper and would create a double payment to the employees paid for work performed at the overtime rate.. For the reasons stated above it is improper to compensate the OTDL clerks for all hours worked by the letter carriers.

The union requested remedy to compensate the clerks to include interest is without merit.

Therefore, the above captioned grievance is denied.

The Union, through Mr. Jacobs, filed Additions and Corrections. In addition to contending that reliance upon the JCIM was inappropriate inasmuch as it was not in existence when the original grievance that resulted in the Butler Award was filed in 2002, Mr. Jacobs states one of the Union's fundamental arguments in this matter. After again quoting Paragraph 2 of the Butler Award, Jacobs states:

If Management believed that arbitrator Butler's award was contrary to law, or that it did not draw its essence from the collective bargaining agreement, or that it was based upon gross error of fact or a "nonfact", or that it was contrary to public policy, or that Butler did not conduct a fair hearing or exceeded his authority, a notice of a motion to vacate, modify, or correct the award could have been served by Management upon the adverse party or his attorney within three months after the award was filed or delivered.

## DISCUSSION

### A. THE ISSUE

The parties have starkly different views of the issue in this matter. The Union contends that the Service has simply refused to comply with a properly issued arbitration award and has compounded that

failure by its refusal to provide relevant information that is needed to achieve compliance. The Service states that the issue concerns a disagreement between the parties concerning the intent and scope of the Butler Award. In light of this disagreement over the issue, the parties agreed that the arbitrator in this matter could frame the issue.

After review of the record the issue in this matter is simply what is an appropriate basis to achieve compliance with the Butler Award?

## **B. POSITIONS OF THE PARTIES**

Both parties vigorously and thoroughly argued the instant matter both at the hearing and in their post-hearing briefs. Both parties have submitted a number of prior decisions of other arbitrators in support of their different positions. Those arguments and supporting opinions have been carefully considered. What follows constitutes a relatively short summary of their arguments.

The Union's view is straightforward and uncomplicated. Following their request and receipt of a clarification from Arbitrator Butler concerning his Award, the Union submits that the award speaks for itself. Upon a calculation of the total amount of wages paid to the letter carrier employees who were assigned to the CFS during the period in question<sup>2</sup>, that amount should be divided equally among all the clerks who were listed on the OTDL. The Union asserts that list consists of the 26 names submitted by local President Jacobs following the issuance of the Butler Award.

The Union strongly opposes all arguments submitted by the Service that seek to minimize the scope of the Butler Award. It argues that the Service failed to take any action at the appropriate time to seek either vacation or modification of the Butler Award. The Service's actions are simply an unwarranted attempt to re-litigate the original case and obtain a "second bite at the apple". The Service's actions in using carrier employees at the CFS were flagrant. The Service's claim that it seeks clarification as to the "intent" of the Butler Award is specious. There is absolutely no basis for altering the Butler Award.

The Service asserts that it is neither contesting the Butler Award nor otherwise denying any liability for the violation found by Butler. Its dispute is with the scope of the Award. It contends that the

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<sup>2</sup> While the precise dates are not clear from the record in this matter, there is no dispute that the violation occurred within a defined period of time beginning fourteen days prior to the filing of the original grievance (@May 1, 2002) and ended in either 2005 or 2006. There is no ongoing liability.



only evidence in the record before Arbitrator Butler was that there were only 8 clerk employees on the OTDL and that a literal application of the Butler Award would constitute an unwarranted "windfall" for those eight employees with a monetary award that would far exceed a "make whole" remedy. The Service contends that there is no basis to conclude that Arbitrator Butler sought to impose a punitive award and therefore any remedy must be limited to a "make whole" remedy. That remedy should be a calculation of 16 hours per week of allowable overtime, less any overtime otherwise worked, time off, or other mitigating circumstances. The Union's attempt to expand the number of employees who were allegedly on the OTDL is unwarranted and constitutes new argument.

#### OPINION

The threshold question in this matter is whether or not there has been compliance with the Butler Award. Clearly there has not been any compliance whatsoever and the Union's grievance in that regard is sustained. The Service does not contend that it has made any real effort to comply with the Butler Award but defends that non-performance on the basis that the Union's position is untenantable.

The real issue is how to effectuate the Butler Award in a way that is consistent with well recognized principles of arbitral practice. At the outset, it is clear that the violation found by Arbitrator Butler in connection with the CFS staffing is significant and unchallenged. The use of carrier employees to perform clerk work at the CFS was found to be incorrect and in violation of the parties' Agreement. There is no reason or need to revisit that part of the decision. The decision, however, does not justify the Union's position regarding the requested remedy. The Union interprets the Butler Award as creating a lump sum pool of money based upon all the hours worked by the carriers at the CFS. That pool, according to the Union, is to be completely and equally dispersed among whatever pool of employees is found to be entitled to a remedy, i.e. clerk employees who were on the OTDL.

As argued by the Service, depending upon the number of employees so identified, this could result in a financial windfall for a small group of employees, well in excess of a "make-whole" remedy. This position has merit. Such an award would be contrary to well recognized principles in labor arbitration matters that remedies are intended to re-create, as much as possible, the situation that would have obtained in the absence of a violation, i.e. the status quo ante. Arbitration proceedings are not akin to lawsuits in which punitive damages are sought and financial remedies will not normally exceed what is necessary to make employees whole. Absent identified extenuating circumstances that are not present in the instant matter, there is no basis to direct a remedy that might result in employees

receiving financial payments in excess of what would have been earned absent a violation. There is nothing in Arbitrator Butler's written opinion that in any way suggests that he intended to direct an extraordinary award of punitive damages and there is no basis for this arbitrator to read that intent into his decision.

The Union's reliance upon the clarification obtained from Arbitrator Butler is understandable but unpersuasive. It is frankly difficult to accord the clarification a great deal of weight when it consists of three sentences in an e-mail and simply repeats the language of the original award, which in turn is a verbatim replication of the Union's requested relief from its Step 2 appeal. While the Union is correct in asserting that the Service did not seek any further clarification during the brief period that Arbitrator Butler retained jurisdiction, it must also be observed that the Union did not take any action to enforce the Butler Award through judicial proceedings that were available to it. What the Union elected to do was to file a new grievance. As the arbitrator assigned to resolve the new grievance, I find it within my authority to determine the appropriate remedy for any violation I find to have occurred. Having determined that the Service has violated the Agreement by its failure to comply with the Butler Award, I will determine how that compliance is accomplished.

With respect to such compliance, a critical question concerns which employees are entitled to compensation. The Service contends that this group should be limited to the eight clerks listed on the OTDL that was made part of the record in the hearing before Arbitrator Butler. This position has no merit. There is no evidence concerning the reasons or circumstances for which such information was placed before Arbitrator Butler. Given the scope of the violation that spanned over a period of several years, it is simply too self-serving to suggest that any liability is limited by a single OTDL. For several years, the Service improperly employed carriers to perform clerk work. Absent those carriers, clerk employees who had stated their desire for overtime would have been employed in overtime situations.<sup>3</sup> In the absence of any evidence to the contrary, the list submitted by Mr. Jacobs will be the base point for the parties' subsequent discussions to finally resolve this matter. This is not to conclude that each and every one of those employees listed is necessarily entitled to a remedy and the Service is not

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<sup>3</sup> In reality, had carriers not been improperly used at the CFS, other Union-represented clerks may have been transferred or hired for those positions. There is no apparent dispute, however, that employees on the OTDL constitute the "available and qualified employee(s) who would have been scheduled to work but for the contractual violation" as set forth in the Joint Contract Interpretation Manual (JCIM), p.39 (July, 2012 version)



precluded from seeking to prove that certain employees were not on the OTDL at any time during the course of the violation, but the burden of proof will be upon the Service.

Contrary to Arbitrator Butler's Award, employees on the OTDL shall not be paid equally. Rather, each employee shall be entitled to payment for overtime hours, at the applicable overtime rate, up to a maximum of eighteen (18) hours per week.<sup>4</sup> Such payment will be calculated for those periods of time when such employees were actually available for work during the relevant period. If an employee was on leave of any nature or was simply absent from work on scheduled days, no payment is required for those days. Similarly, and obviously, if an employee transferred to another facility or otherwise ended their employment with the Service, such action would terminate their eligibility. The Service is directed to, upon request, immediately make available to the Union any and all work records needed to establish the eligibility and amount due for the particular employees in question.

Interest will be paid at the Federal Judgment Rate on all monies due. The computation of interest will commence from August 8, 2009, the date of the Butler Award, as clarified.

In closing, it must be emphasized that the intent of this Decision is to facilitate closure on a case that is now more than 11 years old. While it might be easy to suggest that one party or the other has not acted in good faith over the lengthy course of this matter, there is nothing to be gained from ascribing such findings. Even with the remedy directed herein, there may be lingering belief on the part of the Union that the Service has somehow "gotten away" with the commission of a serious contract violation. Although I disagree with any such suggestion, the fact remains that arbitration is not a failsafe system that is capable in every instance to perfectly remedy violations of the parties' Agreement.

#### AWARD

1. The grievance is sustained. The Service has failed to comply with the Award issued by Arbitrator Butler in Case No. F00C-4F-C 02170515 / CL-209-02C.

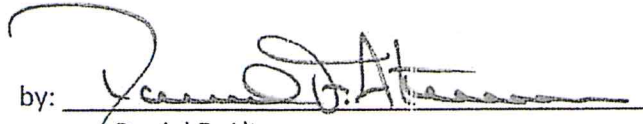
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<sup>4</sup> The parties disagree whether the number should be 16 or 20. Based on two hours of overtime per scheduled day (2x5=10) and an additional 8 hour day of overtime, I believe 18 hours per week is an acceptable number. In this regard, it must be observed that notwithstanding a longstanding and well-developed relationship between the parties, there is an apparent lack of procedures and/or precedent to determining appropriate remedies in matters such as this.

2. The Service is directed to compensate any and all employees who were on the OTDL at the CFS during the relevant period when the violation was occurring. Said compensation and interest will be determined in accordance with the Opinion above.

3. The Arbitrator will retain jurisdiction over this matter to resolve any disputes that may arise with regard to the compliance with this award.

Dated: June 27, 2013

by:   
Daniel F. Altemus